

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Benjamin Shelton	Team: Squad #6	CCRB Case #: 201808754	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Sunday, 10/21/2018 3:45 PM	Location of Incident: Astor Place subway station	Precinct: 09	18 Mo. SOL 4/21/2020	EO SOL 12/6/2020	
Date/Time CV Reported Sun, 10/21/2018 4:41 PM	CV Reported At: CCRB	How CV Reported: On-line website	Date/Time Received at CCRB Sun, 10/21/2018 4:41 PM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. An officer			Unknown
2. POM Darwin Burgos	14976	960292	TB DT04
3. POM Nelfi Martedelacruz	18139	960878	TB DT04
4. POM Charles Guevarra	09774	960628	TB DT04

Officer(s)	Allegation	Investigator Recommendation
A.POM Darwin Burgos	Abuse: Police Officer Darwin Burgos forcibly removed an individual to the hospital	
B.POM Nelfi Martedelacruz	Abuse: Police Officer Nelfi Marte de la Cruz forcibly removed an individual to the hospital.	
C.POM Darwin Burgos	Force: Police Officer Darwin Burgos used pepper spray against an individual.	
D.POM Nelfi Martedelacruz	Force: Police Officer Nelfi Marte de la Cruz used pepper spray against an individual.	
E.POM Darwin Burgos	Force: Police Officer Darwin Burgos used physical force against an individual.	
F.POM Darwin Burgos	Discourtesy: Police Officer Darwin Burgos spoke discourteously to an individual.	
G.POM Charles Guevarra	Discourtesy: Police Officer Charles Guevarra spoke discourteously to an individual.	
H.POM Charles Guevarra	Abuse: Police Officer Charles Guevarra threatened an individual with the use of force.	
I.POM Charles Guevarra	Force: Police Officer Charles Guevarra used physical force against an individual.	
J. An officer	Force: An officer used physical force against an individual.	

Case Summary

On October 21, 2018, § 87(2)(b) filed this complaint via the CCRB's website.

On October 21, 2018, at approximately 3:48 p.m., PO Darwin Burgos and PO Nefli Marte de la Cruz of Transit District 4 were on patrol on a downtown 6 train when approached an outstretched individual on the downtown platform at Astor Place station in Manhattan. The individual was initially unresponsive but then became violent. PO Burgos and PO Marte de la Cruz made the decision that the individual was a violent Emotionally Disturbed Person (EDP) and needed to be hospitalized. (**Allegations A and B: Abuse of Authority**, § 87(2)(g)). Both officers discharged their pepper sprays (**Allegations C and D: Force**, § 87(2)(g)) and PO Burgos attempted to lever one of the individual's arms with his asp (**Allegation E: Force**, § 87(2)(g)). PO Marte de la Cruz requested additional units and more officers arrived, including PO Charles Guevarra of Transit District 4. Body-worn cameras (BWC) captured PO Burgos and PO Guevarra using profanity towards the individual (**Allegation F-G: Discourtesy**, § 87(2)(g)). PO Guevarra threatened the individual with his taser (**Allegation H: Abuse of Authority**, § 87(2)(g)) and levered one of the individual's arms with his asp (**Allegation I: Force**, § 87(2)(g)) in helping to restrain the individual. Once restrained, officers took the individual out of the subway station and to the ambulance. On his way out of the station, an officer pushed an individual (**Allegation J: Force**, § 87(2)(g)).

No arrests were made and no summonses were issued in this incident. BWC footage of this incident was provided by IAB (BR 01-11).

Findings and Recommendations

Allegation A – Abuse of Authority: Police Officer Darwin Burgos forcibly removed an individual to the hospital.

Allegation B – Abuse of Authority: Police Officer Nefli Marte de la Cruz forcibly removed an individual to the hospital.

The victim in these allegations was unidentified. The Aided report (BR 12) and the Threat, Resistance, and Injury (TRI) reports (BR 13-14) provide no specific pedigree information for the victim, referring to him as § 87(2)(b) or "Unknown." No other documentation nor civilian or officer statements identified him.

It is undisputed that PO Burgos and PO Marte de la Cruz approached an unidentified male individual outstretched on the southbound platform of the 6-train Astor Place subway station (BR 15-16). He appeared disheveled and had clothes strewn around and over his body. Officers asked him several times if he needed aid but he was unresponsive to officers' questions and refused to get up. When officers motioned to help him up from the ground, the individual got onto his feet and swung a closed fist at least once toward PO Burgos without making contact. At this point, due to the individual being generally disheveled and outstretched on a subway platform with clothes strewn over himself, his unresponsiveness to officers' questions, and his attempt to punch a police officer who only attempted to render aid and assistance to him, both PO Burgos and PO Marte de la Cruz considered the individual to be a violent EDP and began to restrain the individual to remove him to the hospital. PO Marte de la Cruz put a call over the radio requesting additional units and reported that he and PO Burgos had a violent EDP at their location (BR 17). Due to the nature of the call, an ambulance was dispatched to the location. PO Burgos and PO Marte de la Cruz did not ever intend at any point to summons or arrest the individual despite his actions.

An EDP is defined as a person who appears to be mentally ill or temporarily deranged and is conducting himself in a manner which a police officer reasonably believes is likely to result in serious injury to himself or others (BR 18). If the EDP is violent, no attempt will be made to take the EDP into custody without the direction of a supervisor unless there is an immediate threat of physical harm to anyone present. If so, the officer must take reasonable measures to terminate or prevent such behavior. (Patrol Guide Procedure 221-13)

§ 87(2)(g)

§ 87(2)(g)

Allegation C – Force: Police Officer Darwin Burgos used pepper spray against an individual.

Allegation D – Force: Police Officer Nelfi Marte de la Cruz used pepper spray against an individual.

Allegation E – Force: Police Officer Darwin Burgos used physical force against an individual.

Allegation H – Abuse of Authority: Police Officer Charles Guevarra threatened an individual with the use of force.

Allegation I – Force: Police Officer Charles Guevarra used physical force against an individual.

Video footage obtained for this incident, captured by responding officer PO Bryan Thooho of the 9th Precinct's BWC and provided by IAB, shows the incident from the moment additional units arrive to assist PO Burgos and PO Marte de la Cruz to when PO Guevarra uses his asp as a lever to free one of the individual's arms (BR 19). PO Guevarra is heard threatening to tase the individual and is then depicted handling his asp before being largely obstructed by other officers in the video. PO Guevarra is the first officer who assists PO Burgos and PO Marte de la Cruz in restraining the individual. Approximately five to six officers are depicted physically interacting with the individual.

PO Burgos and PO Marte de la Cruz stated that upon the individual swinging a closed fist at PO Burgos, both officers brought the individual down to the ground and held his arms as he laid on the ground and kicked at the officers. PO Burgos and PO Marte de la Cruz ordered him multiple times to stop resisting and provide his hands and continuously attempted to pull the individual's arms out from under his body so that they could handcuff him. The individual continued tensing his arms under his body and kicking at officers.

Both officers decided to use their pepper sprays to achieve compliance. Neither recalled whether they issued any verbal warnings before discharging their pepper spray. PO Burgos got to his feet and sprayed the individual's face from less than three feet away once for a period of time he did not recall. PO Burgos returned to the ground and officers continued to order the individual to provide his hands and pull on his arms without achieving compliance. PO Marte de la Cruz did not recall PO Burgos use his pepper spray. PO Marte de la Cruz then discharged his pepper spray at the individual's face once for a couple of seconds as he was still lying directly next to him. PO Marte de la Cruz stated the pepper spray caused the individual to kick at officers more. His arms remained tensed under his body. PO Burgos removed his asp and placed it in a gap between the individual's body and the crook of his elbow. He levered the asp back and forth several times to

try and free the man's arm out from under his body. The individual was never struck with the asp. PO Burgos' efforts with the asp were unsuccessful and he threw it to the side. PO Marte de la Cruz did not recall PO Burgos' use of an asp. At this point, PO Marte de la Cruz reported the violent EDP situation and requested additional units over the radio. In approximately one minute, multiple officers from various commands arrived on scene, including PO Guevarra. With the arrival of additional units, PO Burgos, PO Marte de la Cruz, and other officers successfully gained control of the individual's arms and handcuffed him before he was escorted out of the station to an ambulance which transported him to the hospital. Both PO Burgos and PO Marte de la Cruz did not recall how many or which officers assisted and what specific actions they took.

When he arrived on scene, PO Guevarra stated that he observed PO Burgos and PO Marte de la Cruz pull the individual's tensed arms in unsuccessful attempts to handcuff him while they ordered him to give them his hands (BR 20). PO Guevarra assisted by crouching down next to the individual and issued multiple commands to the individual to free his hands and pulled at one of his arms. The individual had no verbal or behavioral response to officers' commands and kept his arms tensed under his body. PO Guevarra rose from the ground and took out his taser. He told the individual that he was going to tase him. PO Guevarra explained that he decided to use his taser at this point as the individual was non-compliant to verbal commands. A more tenured officer on scene advised PO Guevarra not to use his taser. PO Guevarra then holstered it and took out his asp. He crouched down again next to the individual and put his asp into a gap near one of the individual's armpits and levered it in a circular motion which forced the individual's arm out from under his body and behind his back. PO Guevarra never struck the individual with his asp. PO Guevarra held his arm and placed a handcuff on his wrist. Another officer freed the individual's other arm and placed it behind his back. PO Guevarra and this other officer placed the other handcuff on the individual's other wrist. PO Guevarra stated that he was unsure of when he arrived in relation to other officers and why the individual was being restrained as he was solely focused on assisting PO Burgos and PO Marte de la Cruz. He was unable to attribute specific actions to specific officers once he began to restrain the individual.

Force will be used only to the extent necessary to restrain an EDP until they are delivered to a hospital. Restraining equipment including handcuffs may be used if the EDP is violent or resists. The use of a taser in restraining an EDP is allowed, if necessary. (Patrol Guide Procedure 221-13)

Pepper spray may be used to gain or maintain control of persons who are actively resisting lawful custody or exhibiting active aggression, where verbal commands have not been effective in overcoming physical resistance, and to gain physical control of an EDP (BR 21). An officer is to aim the pepper spray at a subject's eyes using two, one seconds bursts at a minimum distance of three feet. (Patrol Guide Procedure 221-07)

Officers may use force to ensure the safety of a member of service and place a person in custody (BR 22). The level of force must be reasonable under the circumstances. (Patrol Guide Procedure 221-01)

§ 87(2)(g)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

§ 87(2)(g)

As noted, the AIDED could not be contacted. Additionally, § 87(2)(b) did not witness this portion of the incident and additional officers had not yet arrived on scene as per officer testimony and the available video footage. § 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

Allegation F – Discourtesy: Police Officer Darwin Burgos spoke discourteously to an individual.

Allegation G – Discourtesy: Police Officer Charles Guevarra spoke discourteously to an individual.

In BWC footage from PO Thoocho, referenced above, PO Burgos identified himself as stating, “Give me your fucking hands.” He explained that he used the profanity due to exhaustion and frustration after issuing multiple unsuccessful commands and an ongoing struggle with restraining the individual as the individual kicked at officers, and that he got caught up in the moment. In the same footage, PO Guevarra was identified to have stated, “If you don’t give me your hands, I’ll fucking tase you” and, “Let me tase this motherfucker.” PO Guevarra stated that he used profanity as he grew frustrated with the individual’s non-compliance and was in the middle of a high-pressure situation.

Officers are to be courteous and respectful to civilians (BR 23). (Patrol Guide Procedure 203-09) An exception to this rule exists if an officer is attempting to maintain control of a situation during a stressful street encounter then that officer’s use of an impolite word does not rise to the level of actionable misconduct (BR 24). (NYPD Disciplinary Case #79627/04)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

Allegation J – Force: An officer used physical force against an individual.

§ 87(2)(b) stated that he attempted to enter the Astor Place subway station from the street via the staircase leading to the downtown 6-train (BR 25-26). As he was halfway down the stairs, approximately 20 officers in uniform started ascending the same staircase. Multiple officers were commanding civilians to move out of the way. § 87(2)(b) turned to ascend the stairs and observed a young white man on his left. An officer who had been ordering people out of the way, described as § 87(2)(b)

§ 87(2)(b), told the young man he was not moving fast enough and pushed him once with both hands on his back. The young man did not appear to sustain any injuries and did not stumble.

Due to the general description of the victim of this allegation, the investigation could not identify him.

PO Burgos, PO Marte de la Cruz, and PO Guevarra did not recognize any specific officer matching the description provided by § 87(2)(b). No officer observed any officer push any civilians or passers-by during the incident. Though a male voice is heard multiple times yelling loudly at people to move out of the way in several BWC videos, no officer is visually depicted making those statements. A large number of officers arrived on scene, as reflected in police documentation and available footage, though there exists the possibility that even more officers responded without being documented due to the urgent nature of a violent EDP job.

Force may be used when placing an individual in police custody to reasonably ensure the safety of an officer or a third person. (Patrol Guide Procedure 221-01)

§ 87(2)(g)

Civilian and Officer CCRB Histories

- This is the first CCRB to which § 87(2)(b) has been party (BR 27).
- PO Burgos has been a member of service for three years and has been subject in one other CCRB complaint with one allegation that was not substantiated (see officer history).
- PO Marte de la Cruz has been a member of service for three years has been subject in one other CCRB complaint with one allegation that was not substantiated (see officer history).
- PO Guevarra has been a member of service for three years and has not been subject in any other CCRB complaints (see officer history).

Mediation, Civil and Criminal Histories

- § 87(2)(b) accepted mediation. However, due to the lack of officer identification pertaining to his primary complaint, mediation was not viable.
- A FOIL request was submitted with the New York City Office of the Comptroller for any related Notices of Claim on May 22, 2019, and will be added to the case file upon receipt.
- According to the Office of Court Administration, § 87(2)(b) has no criminal convictions within New York City as of May 22, 2019 (BR 28).

Squad No.: 6

Investigator:	_____	<u>Inv. Benjamin Shelton</u>	_____
	Signature	Print Title & Name	Date

Squad Leader:	_____	<u>IM Jessica Peña</u>	_____
	Signature	Print Title & Name	Date

Reviewer:	_____	_____	_____
	Signature	Print Title & Name	Date